

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE NEW YORK TIMES COMPANY,

Plaintiff,

- against -

CENTRAL INTELLIGENCE AGENCY,

Defendant.

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16 Civ. 3098 (JSR)

**DECLARATION OF DAVID E. MCCRAW
IN SUPPORT OF PLAINTIFF’S CROSS-MOTION
FOR PARTIAL SUMMARY JUDGMENT
AND IN OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

I, DAVID E. MCCRAW, state and declare as follows under penalty of perjury:

1. I am a Vice President and Assistant General Counsel of The New York Times Company (“The Times”), publisher of *The New York Times* newspaper and nytimes.com. I am duly licensed to practice law in the State of New York and before this Court and serve as counsel of record for The Times. I make this declaration from my own personal knowledge and a review of publicly available Government documents and in opposition to Defendant’s motion for summary judgment and in further support of Plaintiff’s cross-motion for partial summary judgment.

The FOIA Request

2. On October 22, 2013, The Times submitted a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to Defendant Central Intelligence Agency (“CIA”) seeking three documents relating to chemical weaponry in Iraq (the “Request”).

3. The Request specifically sought:

- a. “A document believed to be published in August 2007, bearing the approximate title, ‘Iraq: Recovered CW Munitions Probably Remnants of Pre-1991 CW Program.’”
- b. “A document believed to be published in Dec. 2006 as a CIA WIRE report and titled, ‘Iraq: Recovered Pre-1991 Mustard Rounds May Pose Localized Threat.’”
- c. “A document believed to be published in March 2007 as CIA WIRE report and titled, ‘Iraq: US Forces Experienced First Sulfur-Mustard Related Injuries.’”

4. A true and correct copy of the Request is attached as Exhibit A to the Declaration of Antoinette B. Shiner, Information Review Officer, Litigation Information Review Office Central Intelligence Agency (“Shiner Declaration”). (See Docket No. 13-1.)

5. On December 30, 2013, the CIA denied the Request (the “Denial”). The CIA stated in the Denial that it “can neither confirm nor deny the existence or nonexistence of records responsive to [The Times’s] request.” In issuing this “Glomar response,” the CIA relied on both FOIA Exemption 1, which exempts properly classified information, and FOIA Exemption 3, Section 6 of the CIA Act of 1949 and section 102A(i)(1) of the National Security Act of 1947. A true and correct copy of the Denial is attached as Exhibit B to the Shiner Declaration. (See Docket No. 13-2.)

6. The Times timely filed an administrative appeal with the CIA in January 2014 (the “Appeal”). A true and correct copy of the Appeal is attached as Exhibit C to the Shiner Declaration. (See Docket No. 13-3.)

7. On March 5, 2014, the CIA acknowledged receipt of the Appeal. A true and correct copy of the CIA’s acknowledgment letter is attached as Exhibit D to the Shiner Declaration. (See Docket No. 13-4.) On June 3, 2014, the CIA denied the Appeal in its entirety, stating that the agency had properly invoked FOIA Exemptions 1 and 3. A true and correct copy of the CIA’s response to the Appeal is attached as Exhibit E to the Shiner Declaration. (See Docket No. 13-5.)

The Times’s Reporting on Chemical Weaponry in Iraq

8. The Times submitted this Request as part of its ongoing reporting on chemical weapons that were uncovered by U.S. troops in the aftermath of the U.S. invasion.

9. On October 14, 2014, The Times published an interactive news feature (the “Article”) on its website that included an in-depth article reporting that from 2004 to 2011 American and American-trained Iraqi troops repeatedly encountered, and in some instances were injured by, chemical weapons in Iraq that had been abandoned years earlier. See C.J. Chivers, The Secret Casualties of Iraq’s Abandoned Chemical Weapons, N.Y. Times (Oct. 14, 2014), <https://www.nytimes.com/interactive/2014/10/14/world/middleeast/us-casualties-of-iraq-chemical-weapons.html>. A version of the Article was also published in the print edition of *The New York Times* on October 15, 2014 on page A1.

10. A true and correct copy of the Article, excluding text from accompanying infographics and captions in the online version, is attached as Exhibit A.

The CIA's and Other Agencies' Official Disclosures

11. The CIA and other agencies have declassified a number of reports and memoranda that discuss, often at great length, the interest of the CIA and other agencies in the scale and location of the chemical weaponry in Saddam Hussein's weaponry, as well as the CIA's assessments of what discovery of those weapons might mean for U.S. troops and interests.

12. On October 6, 2004, the Iraq Survey Group ("ISG"), a multinational taskforce established to search for unconventional weapons in Iraq, made public a lengthy report on the state of Iraq's WMD programs, known as the "Duelfer Report" for ISG's leader Charles Duelfer, a former adviser to the Director of Intelligence.¹ Attached as Exhibit B are true and correct copies of the relevant pages of the Duelfer Report. Attached as Exhibit C are true and correct copies of the relevant pages of an addendum to the Duelfer Report that was published in March 2005.

13. Attached as Exhibit D are true and correct copies of the relevant pages of Hide and Seek: The Search for Truth in Iraq by Charles Duelfer, which was published in 2009 by PublicAffairs, a member of the Perseus Books Group.

14. Attached as Exhibit E are true and correct copies of the relevant pages of "Principal Challenges in Post-Saddam Iraq." The report was written by the National Intelligence Council ("NIC") in January 2003, when the NIC was still reporting to the Director of Central Intelligence. It was declassified in September 2009. The NIC is now part of the Office of the

¹ See Douglas Jehl, The Issue of War: Inspector's Judgment; U.S. Report Finds Iraqis Eliminated Illicit Arms in 90's, N.Y. Times, Oct. 7, 2004, available at <https://www.nytimes.com/2004/10/07/washington/the-issue-of-war-inspectors-judgment-us-report-finds-iraqis.html> (reporting that the Duelfer Report was made public on October 6, 2004).

Director of National Intelligence.² The report is available through the CIA's FOIA Electronic Reading Room, a repository of released documents,³ at <http://www.foia.cia.gov/document/0005299384>.

15. Attached as Exhibit F is a true and correct copy of "Iraq: Unusual Logistical Activities in Preparation for an Anticipated US-Led Campaign." It was written by the NIC in coordination with the CIA in May 2002 and declassified in November 2009. The report is available through the CIA's FOIA Electronic Reading Room at <http://www.foia.cia.gov/document/0001327022>.

16. Attached as Exhibit G is a true and correct copy of "Impact and Implications of Chemical Weapons Use in the Iran-Iraq War." The CIA drafted the report in April 1988 and declassified it in August 2010.

17. Attached as Exhibit H is a true and correct copy of a memorandum sent on September 5, 2002 from Glen Shaffer, then the Director for Intelligence of the Joint Staff, to then-Secretary of Defense Donald Rumsfeld. The Department of Defense declassified the memorandum in January 2011.

18. Attached as Exhibit I are true and correct copies of the relevant pages of "Misreading Intentions: Iraq's Reaction to Inspections Created Picture of Deception." The report was written in January 2006 as part of the CIA's "Iraq WMD Retrospective Series" that addressed the agency's understanding of Iraq's weapons of mass destruction in the aftermath of the 2003 invasion. The CIA declassified it in June 2012.

² See Office of the Director of National Intelligence, About: Organization: National Intelligence Council – Who We Are, <https://www.dni.gov/index.php/about/organization/national-intelligence-council-who-we-are> (last visited June 30, 2016).

³ See CIA, Library: Freedom of Information Act Electronic Reading Room, <http://www.foia.cia.gov/> (last visited June 30, 2016).

19. Attached as Exhibit J is a true and correct copy of “Iraq: No Large-Scale Chemical Warfare Efforts Since Early 1990s,” a report that was also part of the CIA’s “Iraq WMD Retrospective Series.” The CIA wrote it in January 2005 and declassified it in November 2013.

20. Attached as Exhibit K are true and correct copies of the relevant pages of “Iraq: Chemical Weapons Continue to Be Recovered,” a report dated April 4, 2006 from the U.S. Department of the Army’s National Ground Intelligence Center. The Army declassified it in August 2014.

21. Attached as Exhibit L are true and correct copies of the relevant pages of the U.S. Senate Select Committee’s executive summary of its “Committee Study of the [CIA’s] Detention and Interrogation Program.” It was released to the public in December 2014.

22. Attached as Exhibit M are true and correct copies of the relevant pages of “Iraq’s Continuing Programs for Weapons of Mass Destruction,” a report whose publication was overseen by the Director of Central Intelligence in October 2002. The CIA declassified it in December 2014.

23. The Times had hoped that the CIA would voluntarily declassify the three documents at issue here in the aftermath of The Times’s first articles about the chemical warheads and the concealed injuries to service personnel. While other information was released by the Government, these reports were not, prompting this litigation.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, NY
July 1, 2016

/s/ David E. McCraw